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PRISON POWER CORRUPTS ABSOLUTELY: EXPLORING THE PHENOMENON OF PRISON GUARD BRUTALITY AND THE NEED TO DEVELOP A SYSTEM OF ACCOUNTABILITY

I. INTRODUCTION

Early this year the American public watched in disgust as the media broadcast shocking images of human torture and humiliation. These images included naked prisoners placed in human pyramids, prisoners arranged in sexual positions and forced to masturbate, guards punching and kicking inmates, and one guard standing smiling next to the bruised body of a dead prisoner wrapped in ice.¹ Other offenses committed by members of the Army's 372nd Military Police Company (MP), who were "assigned to guard [Iraqi] captives at Abu Ghraib"² prison, included "sodomizing a [prisoner] with a chemical light, . . . requiring men to wear women's underwear,"³ placing naked prisoners in a pile while guards jumped on them and stomped on their hands, and in one case, attaching a wire to a prisoner's penis and threatening him with electrocution if he lost his balance while standing on an unstable box.⁴ While the general American public was outraged by these images and Secretary of Defense Donald Rumsfeld "bemoaned that the abuse was 'un-American,'"⁵ inmates housed in correctional facilities across the nation were not surprised, especially when the news established that two of the seven MPs charged with the abusive acts were prison guards in their civilian life.⁶

Although quite often unknown to the American public, inmate abuse is a common problem in prisons and jails across the country.

1. *Abuse of Iraqi POWs by GIs Probed* (CBS/60 Minutes II television broadcast, Apr. 28, 2004), available at <http://www.cbsnews.com/stories/2004/04/27/60II/printable6146.shtml> (last visited Dec. 1, 2004); see also Vicki Haddock, *Cruelty Comes to Us So Quickly, Most People Would Play Role of Torturer*, S.F. CHRON., May 9, 2004, at E1.

2. Toni Locy, *Special Report: Interrogators Hid Identities; Prison Questioners Called "Bond," "Doe,"* USA TODAY, May 28, 2004, at A1, 2004 WL 58557697.

3. Haddock, *supra* note 1.

4. *Id.*; Locy, *supra* note 2.

5. See Helen Ubinas, *Abuse Normal in U.S. Prisons*, HARTFORD COURANT, May 13, 2004, at B1.

6. Haddock, *supra* note 1.

Because it is difficult to penetrate prison walls to produce evidence of abusive practices, and it is rare for a prison guard to defy his fellow officers and speak out against wrongful conduct,⁷ society is generally unaware of how American inmates are handled. An informed public, however, would be disappointed to know that when inmates are mistreated, the possibility of redress is limited and guards are often not held accountable. Whereas inmates in the past could file civil actions in federal district court to seek remedy, a United States Supreme Court decision in 2002 interpreted the Prison Litigation Reform Act (PLRA)⁸ as requiring an inmate alleging abusive treatment to exhaust his administrative remedies in the prison facility before bringing an action in district court.⁹

Forcing inmates to file administrative grievances for assault and abuse by corrections officers brings a new set of litigation to the court system. In the aftermath of *Porter v. Nussle*,¹⁰ inmates are filing complaints that their prison grievances are not being properly handled, and even worse, are being ignored.¹¹ This comment will address the reality of inmate abuse, how prison culture can transform those with power, and the problem *Porter* created in giving the corrections system complete discretion to assess inmates' claims of excessive force against the institution's own employees. Part II of this comment sets out the factual background and rationale of the *Porter* decision. Part III critiques the validation behind passage of the PLRA and discusses incidents of inmate brutality. Finally, Part IV compares the inadequate aspects of grievance procedures in various state prisons and jails to a model grievance process, the Administrative Remedy Program of the Federal Bureau of Prisons.¹² This comment concludes with the suggestion of a program that should be adopted and well-funded in each state to fairly handle inmate grievances and take discretion away from prison guards.

7. Unlike the Army MP who turned in a CD-ROM of the graphic events from inside Abu Ghraib. See Locy, *supra* note 2.

8. Prison Litigation Reform Act (PLRA) of 1995, Pub. L. No. 104-134, 110 Stat. 1321 (codified as amended in scattered sections of 18 U.S.C., 28 U.S.C. & 42 U.S.C.).

9. *Porter v. Nussle*, 534 U.S. 516, 532 (2002).

10. 534 U.S. 516.

11. See, e.g., *Abney v. County of Nassau*, 237 F. Supp. 2d 278 (E.D.N.Y. 2002) (finding that an inmate exhausted administrative remedies when he requested a grievance form after an alleged assault by prison guards but one was never provided to him).

12. See 28 C.F.R. §§ 542.10-.19 (2004); see also U.S. DEP'T OF JUSTICE, FED. BUREAU OF PRISONS, ADMINISTRATIVE REMEDY PROGRAM, available at <http://www.bop.gov/> (last visited Sept. 16, 2004) [hereinafter ADMINISTRATIVE REMEDY PROGRAM].

II. *PORTER* v. *NUSSLE*

"To deny . . . the difference between punching a prisoner in the face and serving him unappetizing food is to ignore the 'concepts of dignity, civilized standards, humanity, and decency' that animate the Eighth Amendment."¹³

In *Porter* the United States Supreme Court had an opportunity to provide inmates with a voice to protest acts of violence against them before a federal judge. Instead, the Court took a harsh route and denied an exception to the exhaustion of remedies requirement in the PLRA for claims of excessive force, finding no difference between egregious prisoner abuse and generic prison condition complaints.¹⁴ Consequently, inmates have been left to struggle within the corrections system.

A. Factual and Procedural Background

On June 15, 1996, corrections officers at the Cheshire Correctional Institution in Connecticut subjected Ronald Nussle to an unprovoked and unjustified beating.¹⁵ The assault was so severe that Nussle "lost control of his bowels, and . . . was warned by the guards that he would be killed if he reported the beating."¹⁶

On June 10, 1999, Nussle filed a complaint under 42 U.S.C. § 1983¹⁷ in the United States District Court for the District of Connecticut stating that corrections officers violated his Eighth Amendment right to be free from cruel and unusual punishment.¹⁸ The District Court dismissed the action due to Nussle's failure to exhaust the prison's administrative remedies¹⁹ under 42 U.S.C. § 1997e(a).²⁰

13. *Hudson v. McMillian*, 503 U.S. 1, 11 (1992).

14. *See Porter*, 534 U.S. at 532.

15. *Id.* at 520-21.

16. Brief for Respondent at 1, *Porter* (No. 00-853).

17. "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . ." 42 U.S.C. § 1983 (2004) [hereinafter section 1983]. Section 1983 "provides the mechanism for [inmates] . . . seek[ing] relief from constitutional deprivations." U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISONER PETITIONS FILED IN U.S. DISTRICT COURTS, 2000, WITH TRENDS 1980-2000, at 5, available at <http://www.ojp.usdoj.gov/bjs/abstract/ppfusd00.htm> (last revised Feb. 5, 2002) [hereinafter BOJ STATISTICS].

18. *Porter*, 534 U.S. at 519.

19. *Id.* at 521.

Nussle appealed to the United States Court of Appeals for the Second Circuit, which reversed the district court's ruling and held that exhaustion of administrative remedies was not required for prisoner claims of assault or excessive force brought under § 1983.²¹ The court decided that excessive force was not a "prison condition," for which the grievance process must be exhausted through administrative remedies.²² The Second Circuit found the term "prison conditions" in the language of § 1997e(a) ambiguous²³ because the PLRA did not clearly define the parameters of what encompassed "prison conditions."²⁴ The court of appeals reasoned that because claims of excessive force were not the type of frivolous suits that the PLRA sought to deter, but instead were "actual violations of prisoners' rights,"²⁵ exhaustion of administrative remedies should not apply.²⁶

B. Rationale of the United States Supreme Court

Whereas the Second Circuit realized the distinction between serious claims of excessive force and daily prison conditions, the Supreme Court focused on the need to rid the court system of frivolous claims and excessive inmate litigation. As a result, the Court placed grievances for physical abuse into the same category as general prison complaints.

The United States Supreme Court reversed the Second Circuit decision in *Porter v. Nussle*, holding that the "exhaustion requirement applies to all inmate suits about prison life, whether they involve general circumstances or particular episodes, and . . . allege excessive force or some other wrong."²⁷ The Court reasoned that § 1997e(a) actions with respect to "prison conditions" were challenges against conditions of confinement, and that included complaints of excessive

20. *Id.*; 42 U.S.C. § 1997e(a) (West 2003) (The exhaustion requirement states "[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison or other correctional facility until such administrative remedies as are available are exhausted.").

21. *Nussle v. Willette*, 224 F.3d 95, 97 (2d Cir. 2000).

22. *Id.* at 100.

23. *Id.* at 101.

24. The Court pointed out that the plain meaning of "'prison conditions' refers to such things as medical treatment, food, clothing, and the nature and circumstances of the housing available in prison" as opposed to particular instances of excessive force or assault. *Id.* at 100.

25. *Id.* at 105.

26. *Id.* at 106.

27. *Porter*, 534 U.S. at 532.

force.²⁸ The Court stressed that the important policy interests in applying the doctrine of exhaustion of administrative remedies to prisoner litigation were: (1) to “afford[] corrections officials time and opportunity to address complaints . . . [within the corrections system] before allowing the initiation of a federal case”²⁹ and (2) the more dominant concern, to “filter out . . . frivolous claims.”³⁰ It appears that the Supreme Court did not take into account our troubled prison system, nor did the Court foresee that inmate litigation regarding unfair and inconsistent administrative remedies would continue to burden federal courts. Eliminating judicial discretion and placing it in the hands of correctional officers allows misconduct to go unreported and unpunished when guards wield their power in improper ways by creating officer allegiances that stifle accountability.³¹

III. ACKNOWLEDGING THE PROBLEM

It is difficult for those behind prison bars to get society to listen to them and, even more difficult, to get them to have sympathy. This becomes a more onerous task when prison life is either exaggerated or downplayed to the extent the public is misinformed. In passing the PLRA, Congress did not accurately represent prisoner litigation and scarcely mentioned the problem of inmate abuse, thus implying its insignificance. The problem is not created because those who become prison guards are bad people. In fact, those who mistreat inmates demoralize the corrections officers who perform their “difficult job with diligence and professionalism.”³² The problem exists because there is a negative facet in the human mind that can act out in harmful ways when given power and control over others. The corrections system must recognize and acknowledge the potential for this problem and discipline accordingly, instead of protecting the wrongdoers stemming from the “us versus them” mentality that tends to exist between prison guards and inmates.

28. *Id.* at 526-27 (finding “two broad categories of prisoner petitions: (1) those challenging the fact or duration of the confinement itself; and (2) those challenging the conditions of confinement” (citing *Preiser v. Rodriguez*, 411 U.S. 475 (1973))). See also *McCarthy v. Bronson*, 500 U.S. 136, 141-42 (1991) (extending prison petitions challenging conditions of confinement to include complaints of excessive force).

29. *Id.* at 525.

30. *Id.*

31. *Corrections Report Finds a Flawed System*, L.A. DAILY J., July 7, 2004, at 6 (an excerpt from the Executive Summary of “Reforming Corrections,” a final report released by the California Corrections Independent Review Panel).

32. *Id.*

A. The Picture Congress Painted

"[S]ome believe that this legislation which has a far-reaching effect on prison conditions and prisoners' rights deserved to have been the subject of significant debate. It was not."³³

The Senators supporting passage of the PLRA painted a picture of inmate litigation as entirely frivolous, reporting exaggerated examples of prisoner claims such as being served chunky peanut butter instead of creamy, not being invited to a pizza party, and insufficient storage locker space, to name a few.³⁴ One reason for overstating prison complaints could be because the goal of the PLRA was to limit prisoner lawsuits and to deter federal courts from "micromanaging America's prisons."³⁵ What emerged from the congressional debates was a sentiment that all inmate litigation is inherently trivial, and few spoke out on behalf of the many meritorious prisoner claims of excessive force.³⁶

Although Senators spoke harshly against the discretion given to federal judges,³⁷ the underlying purpose of the PLRA was to reduce the number of petitions filed by inmates claiming civil rights violations, petitions that clog the court docket and cost the judicial system tremendous amounts of money.³⁸ Congressional proponents of the PLRA stressed their point through statistics, showing a vast increase in the number of lawsuits filed by inmates, increasing from "6,606 in 1975 to 39,065 in 1994."³⁹ These statistics, however, were not taken in the proper context and thus swayed others into believing the sole reason for the increase in litigation was litigious inmates bringing meritless claims. It was quite unfair for Congress to blame the increase in lawsuits on idle prisoners when in actuality it was primarily attributable to the increase in the prison population.⁴⁰ In fact, between 1980 and 1995, the rate at which state inmates filed civil rights claims

33. *Benjamin v. Jacobson*, 935 F. Supp. 332, 340 (S.D.N.Y. 1996), *aff'd in part, rev'd in part*, 172 F.3d 144 (2d Cir. 1999).

34. Ann H. Matthews, *The Inapplicability of the Prison Litigation Reform Act to Prisoner Claims of Excessive Force*, 77 N.Y.U. L. REV. 536, 560 (2002).

35. John Collins, *The Prison Litigation Reform Act: Excessive Force as a Prison Condition*, 21 ST. LOUIS U. PUB. L. REV. 395, 408 (2002).

36. See Jennifer Winslow, *The Prison Litigation Reform Act's Physical Injury Requirement Bars Meritorious Lawsuits: Was it Meant to?*, 49 UCLA L. REV. 1655, 1655-57 (2002).

37. "It is past time to slam shut the revolving door on the prison gate and to put the key safely out of reach of overzealous Federal courts." 141 CONG. REC. S14408-01, *S14418 (daily ed. Sept. 27, 1995) (statement of Sen. Hatch), 1995 WL 568915.

38. See BOJ STATISTICS, *supra* note 17.

39. Winslow, *supra* note 36, at 1662-63.

40. BOJ STATISTICS, *supra* note 17.

was stable, even with the prison population increasing more than threefold.⁴¹ Moreover, it is only a natural effect for escalation in the nation's prison population to cause an increase in prisoner litigation.⁴² Congress was mistaken to strongly intimate that the federal courts monitor only petty prisoner complaints. In fact, a 1995 Bureau of Justice Statistics report indicated that physical security was the most frequently cited issue in civil rights petitions filed by inmates.⁴³

Congress maintained that the PLRA was intended to "help restore balance to prison conditions litigation and . . . ensure that [f]ederal court orders [would be] limited to remedying actual violations of prisoners' rights."⁴⁴ But the exhaustion of remedies requirement prohibits federal courts from hearing any claim unless the inmate exhausts all administrative remedies within the correctional institution. To fulfill its objective of remedying actual violations, Congress should have created an excessive force exception to § 1997e(a) instead of a "broad exhaustion requirement to ensnare"⁴⁵ all forms of inmate grievances.⁴⁶ In essence, Congress and the Supreme Court have blocked inmates' access to federal court. This was done in haste⁴⁷ and was done without explaining the statistics or adequately representing actual violations against prisoners in the form of abuse.⁴⁸ If Congress plans on concealing the harsh realities of inmate life and the Supreme Court defers to their judgment, it becomes difficult for society to appreciate the problems of abuse, and that diminishes the chance for change.

B. The Psychology of Guard vs. Inmate

Long before Congress enacted the PLRA, before the Supreme Court held that prisoners must exhaust claims of excessive force within the prison prior to gaining access to the courts, and before Army MPs abused their role as prison guards by mistreating Iraqi prisoners, Stanford University psychology professor Philip Zimbardo conducted the Stanford Prison Experiment.⁴⁹ The results of this ex-

41. The petition average over this time period was 40 per 1,000 inmates, while the prison population rose from 305,458 in 1980 to 1,025,624 in 1995. *Id.*

42. *Id.*

43. *Id.*

44. See 141 CONG. REC. S14408-01, *supra* note 37, at *S14418.

45. Collins, *supra* note 35, at 409.

46. *But see id.*

47. "The PLRA was the subject of a single hearing in the Judiciary Committee." See Matthews, *supra* note 34, at 560 & n.123.

48. See Winslow, *supra* note 36.

49. Stanford Prison Experiment, <http://www.prisonexp.org> (last visited July 4, 2004).

periment show the astonishing transformation a person can go through when put in the role of prison guard.⁵⁰

In 1971, Professor Zimbardo selected a group of healthy, normal college students to participate in what was supposed to be a two-week experiment to study the social context of a prison-like environment.⁵¹ Arbitrarily designated by the flip of a coin, half of the student participants became guards and the other half prisoners.⁵² A mock prison was created where the guards made up the rules and the prisoners were kept in small living quarters with bars on their cells or in areas of solitary confinement.⁵³ Professor Zimbardo and the other psychologists recorded the daily events on videotape and interviewed the participants throughout the study.⁵⁴ Six days into the experiment, the study was aborted and the mock prison closed down because, as Professor Zimbardo stated, "human values were suspended, self-concepts were challenged, and the ugliest, most base, pathological side of human nature surfaced."⁵⁵

The student prison guards started to physically abuse and psychologically humiliate their fellow student prisoners.⁵⁶ The guards not only mistreated their peers by regarding them "as if they were despicable animals, [and] taking pleasure in cruelty,"⁵⁷ but the guards also became "indifferent to the obvious suffering that their actions produced."⁵⁸ The worst treatment occurred during the guards' night shifts as the guards thought neither the surveillance nor the research team was recording their activities.⁵⁹ It was clear to the psychologists conducting the experiment that the guards "enjoyed the simple act of controlling some other person."⁶⁰ Professor Zimbardo found the pressure

50. *Id.*

51. Craig Haney & Philip Zimbardo, *The Past and Future of U.S. Prison Policy: Twenty-Five Years After the Stanford Prison Experiment*, 53 AM. PSYCHOLOGIST 709 (1998), available at <http://www.prisonexp.org/links.htm>.

52. *Prisons, Prison Reform, and Prisoners' Rights: California: Hearing Before the Comm. on the Judiciary House of Representatives*, 92nd Cong. 111 (1971) (statement of Philip G. Zimbardo, Ph.D. Professor of Psychology, Stanford University), available at <http://www.prisonexp.org/links.htm> (last visited July 4, 2004) [hereinafter *Prison Reform Hearing*].

53. *Id.* at 111.

54. *Id.*

55. *Id.*

56. *Id.* at 112.

57. *Id.*

58. Haney & Zimbardo, *supra* note 51.

59. *Id.*

60. *Prison Reform Hearing*, *supra* note 52, at 112.

to conform among the guards remarkable.⁶¹ Even though not all the guards acted out in brutal ways, none of the “good guards” ever intervened to stop the “bad guards.”⁶² By not speaking out against the “bad guards,” the “good guards” only served to facilitate the corrupt prison environment.⁶³

Professor Zimbardo’s experiment demonstrated that certain roles enable people to arbitrarily use the power given to them. Healthy, normal college students exhibited deviant behavior when given the authority and power of a prison guard. The psychologists noted that even though the prisoners and guards were free to interact in any form during the experiment, “the characteristic nature of their encounters tended to be negative, hostile, affrontive and dehumanising [sic].”⁶⁴

It is the assigning of labels and the ability to control others that creates a hostile environment in prisons. If this social problem is not acknowledged, “the prison situation in our country is guaranteed to generate severe enough pathological reactions in both guards and prisoners as to debase their humanity, lower their feelings of self-worth, and make it difficult for them to be part of a society outside of their prison.”⁶⁵

Eerily enough, the actions taken by the student guards in the Stanford Prison Experiment, such as stripping prisoners naked and chaining them, putting bags over their heads, and sexually humiliating them, parallel the sadistic abuses of Iraqi prisoners by military guards at Abu Ghraib.⁶⁶ Similar to Professor Zimbardo’s experiment, Army MPs were assigned as prison guards without accountability.⁶⁷ Even though abusive guards were not stopped by other guards in the Stanford Prison Experiment, a few soldiers at Abu Ghraib did come forward with evidence of the mistreatment; however, Professor Zimbardo pointed out that these whistleblowers were a rare exception.⁶⁸

Unlike the student prison guards in the Stanford Prison Experiment, some of the Army MPs assigned to and charged with leading the abuse of prisoners at Abu Ghraib had prison guard experience in

61. Haney & Zimbardo, *supra* note 51.

62. *Prison Reform Hearing*, *supra* note 52, at 112-13.

63. *Id.* at 113.

64. Haney & Zimbardo, *supra* note 51.

65. *Prison Reform Hearing*, *supra* note 52, at 114.

66. See CNN, *Researcher: It's Not Bad Apples, It's the Barrel* (May 21, 2004), <http://www.cnn.com/2004/US/05/21/zimbardo.access> (interview with Prof. Zimbardo comparing his study to Abu Ghraib incident).

67. *Id.*

68. *Id.*

their civilian life.⁶⁹ Charles Graner had been a corrections officer at a Pennsylvania maximum security prison before serving time in Iraq with the Army.⁷⁰ Graner was working at that prison when a group of inmates complained about guards using unnecessary force.⁷¹ Graner had been personally sued twice, and one inmate alleged that Graner had made him eat potatoes with a razor blade inside.⁷² Did the hostile behavior these people learned and witnessed as prison guards in American correctional facilities carry over to their role as prison guards in Iraq? Some would say yes and that the only difference between the abuses at Abu Ghraib and what occurs in American prisons is the publicity that followed the Abu Ghraib incident.⁷³

C. A Pattern of Abuse in State Prisons and Jails with a Focus on California

A code of silence among guards exists in various prisons and jails, allowing these officials the discretion to unnecessarily physically harm inmates without having to answer for their wrongs.⁷⁴ Even when an inmate obtains a settlement against an institution, the corrections officers' behavior usually goes unpunished criminally.⁷⁵

In 1971, inmates at Attica prison in New York took control over various sections of the facility, predominately the D Yard.⁷⁶ In seizing control of the prison, inmates held numerous hostages, including guards.⁷⁷ Negotiations took place over several days, in which the inmates' main requests were for better prison conditions.⁷⁸ After negotiations failed, the state police were ordered to forcibly retake the prison.⁷⁹ Following the retaking most, if not all, of the D Yard in-

69. Sgt. Ivan Frederick and Spc. Charles Graner had experience as civilian corrections officers. Locy, *supra* note 2.

70. Paul Lieberman & Don Morain, *The Nation; Unveiling the Face of the Prison Scandal*, L.A. TIMES, June 19, 2004, at A1.

71. *Id.*

72. *Id.*

73. Ubinas, *supra* note 5.

74. See generally Winslow, *supra* note 36.

75. See generally Mark Arax, *Tales of Brutality Behind Bars*, L.A. TIMES, Aug. 21, 1996, at A1; John McDonald, *Jail Monitor Wants Hearing on Complaints of Beatings*, ORANGE COUNTY REGISTER, Aug. 1, 2003, available at 2003 WL 7004829.

76. See *Blyden v. Mancusi*, 186 F.3d 252, 257 (2d Cir. 1999), *remanded*, 113 F. Supp. 2d 441 (W.D.N.Y. 2000).

77. See *Blyden*, 186 F.3d at 257.

78. *Id.*; see also *Al-Jundi v. Estate of Rockefeller*, 885 F.2d 1060, 1062-64 (2d Cir. 1989).

79. See *Blyden*, 186 F.3d at 257.

mates, regardless of their involvement in the riot, were “victims of brutal acts of retaliation by prison authorities.”⁸⁰ Guards set up “gauntlets through which the naked and barefoot prisoners were forced to proceed, one at a time, across broken glass, while being beaten by baton-wielding corrections officers.”⁸¹ Those inmates who were identified as significant participants in the original take-over were sought out for more severe punishment and torture. One prisoner was “forced to lie on a table while officers brutally beat and burned him,”⁸² at the same time being told to “hold a football to his throat with his chin,” and that “he would be killed” if the ball dropped.⁸³ Other heinous behavior included a guard ordering an inmate with two fractured femurs to be dumped from his gurney and commanding that he crawl back to his cell.⁸⁴ When the inmate was unable to do as commanded, officers were observed “repeatedly shoving a screw-driver into the injured prisoner’s anus.”⁸⁵ At the beginning stages of this treatment, the inmates were denied access to attorneys, but after evidence was presented to the court by impartial third parties, the inmates were allowed to visit with counsel and share their experiences.⁸⁶ Had the inmates been required to exhaust administrative remedies for the brutal actions taken against them, it is doubtful the guards would have treated the grievances fairly. In the end, twenty-nine years after the original incident, the parties agreed to a settlement where the inmates, or the representatives of the inmates who were killed, received compensation ranging from \$6,500 to \$125,000.⁸⁷

In California, two significant investigations⁸⁸ took place at Corcoran⁸⁹ and Pelican Bay⁹⁰ State Prisons, and attempts have recently been made to get the FBI involved in investigating operations at the Orange County Jail in Santa Ana, California.⁹¹ At Corcoran State

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* at 257-58.

85. *Id.* at 258.

86. *See generally* *Inmates of Attica Correctional Facility v. Rockefeller*, 453 F.2d 12, 17-19 (2d Cir. 1971).

87. *See* *Al-Jundi v. Mancusi*, 113 F. Supp. 2d 441 (W.D.N.Y. 2000).

88. Both of these investigations took place before Congress enacted the PLRA.

89. *See* *Arax*, *supra* note 75, and *McDonald*, *supra* note 75.

90. *See* *Madrid v. Gomez*, 889 F. Supp. 1146 (N.D. Cal. 1995).

91. *See* *McDonald*, *supra* note 75.

Prison, inmate brutality was commonplace.⁹² In a ritual called “greet the bus,” prison officers would beat shackled inmates arriving from other prisons.⁹³ On other occasions inmates were forced to stand barefoot on scorching asphalt and the ensuing severe burns were blamed on the inmates for playing “barefoot handball.”⁹⁴ In one particular instance, a prisoner with both his arms and legs shackled was ordered to lower his pants and a guard “delivered a jolt to his genitals with a Taser gun.”⁹⁵

Corcoran State Prison is most famous for guards staging “gladiator” fights among the prisoners.⁹⁶ In order to comprehend how contrived these fights were, one must understand prison culture. Inmates create an entire set of rules for themselves within the prison system.⁹⁷ Upon entering prison, an inmate has little choice but to join forces with other members of the inmate’s ethnic group or geographical faction; for instance, Latinos from Northern and Southern California are separate groups and rivals.⁹⁸ In prison culture, “when a fight breaks out between some of ‘your’ people and some of ‘them,’ you are expected to back up ‘your own’—or face retaliation later.”⁹⁹ Guards at Corcoran took advantage of this prison code by inventing “gladiator day.”¹⁰⁰ They would stage fights between Security Housing Unit (SHU)¹⁰¹ inmates by sending known enemies into the same empty yard, which is the size of half a basketball court, and betting on the outcome.¹⁰² Guards would shoot at the inmates with either a gas gun that discharged small wood blocks or with the more lethal carbine rifle, even if the fights did not get out of control.¹⁰³ One Corcoran prison guard, who retired in 1994, stated that at times there were “four or five shootings in an eight-hour shift. . . . It got so bad that we had

92. See Arax, *supra* note 75.

93. *Id.*

94. *Id.* In another occurrence, an inmate was unnecessarily shot by a guard and died. The prison press release untruthfully stated that the inmate “was the aggressor and . . . was shot after failing to heed all warnings.” *Id.*

95. Arax, *supra* note 75.

96. *Id.*

97. See Vince Beiser, *Sentenced to Death by Doing Time*, L.A. TIMES, Nov. 4, 2003, at B13.

98. *Id.*

99. *Id.*

100. Arax, *supra* note 75.

101. The SHU is present at only a few California state prisons and it houses the “baddest of the bad” or the most violent offenders. *Id.*

102. *Id.*

103. *Id.*

medical staff standing by waiting for each incident to happen.”¹⁰⁴ These guards gambled on the violence inherent in prison culture by setting up fights among rivals for their own amusement.¹⁰⁵ Inmates were wounded by corrections officers, sometimes fatally, under the pretense that the officers were breaking up fights.¹⁰⁶ What is most troubling is that the inmates’ voices were not heard. When prosecutors tried to investigate they encountered a wall of silence from guards, and internal investigations appointed by the State Department of Corrections consistently exonerated the officers from any wrongdoing.¹⁰⁷ Finally, a few of the prisons’ own guards, after being rebuffed by the chief deputy warden who knew of the abuses, became whistle-blowers and went against the code of silence.¹⁰⁸

Tales from Pelican Bay State Prison reveal a similar code of silence among its brotherhood of prison guards.¹⁰⁹ In *Madrid v. Gomez*, United States District Judge Thelton E. Henderson recognized the strong code of silence among Pelican Bay prison administrators that was “designed to encourage prison employees to remain silent regarding the improper behavior of their fellow employees, particularly where excessive force ha[d] been alleged.”¹¹⁰ Those who disregarded the code risked retaliation from other corrections officers, so most pretended to be distracted and looked the other way when episodes of excessive force occurred.¹¹¹ This willful ignorance continued at trial. The court noted that “prison staff frequently could not recall the identity of other staff whom they testified did or said certain things, although other details were easily recalled.”¹¹² After five years of abuse, inmates at Pelican Bay filed a class action lawsuit against the prison.¹¹³ The court in *Madrid* found for the inmates and held there

104. *Id.*

105. Abusing inmates for amusement and to cure boredom is also a purported purpose for the maltreatment of inmates at Abu Ghraib. The lead criminal investigator of the abuse at the Iraqi prison testified that the soldiers abused the prisoners “just for fun . . . and to vent their frustration.” Jim Loney, *U.S. Soldiers Abused Iraqis ‘For Fun,’ Court Told*, REUTERS, Aug. 3, 2004, at http://news.yahoo.com/news?tmpl=story&cid=1896&u=/nm/iraq_abuse_england_dc.

106. *See generally* Arax, *supra* note 75.

107. *Id.*

108. *Id.*

109. *See* *Madrid v. Gomez*, 889 F. Supp. 1146 (N.D. Cal. 1995). There was a pattern of abuse by guards, including inmates being left in outdoor cages for significant periods of time. *Id.* at 1172.

110. *Id.* at 1156.

111. *Id.* at 1156-57 n.4.

112. *Id.* at 1157 n.4.

113. *Id.* at 1155.

was a pattern of unnecessary excessive force.¹¹⁴ In light of this favorable verdict, a question arises: could abused inmates now, after *Porter*, receive the same justice through administrative remedies?

In Orange County, California, pleas regularly surface for the FBI to investigate the local county jail.¹¹⁵ The Orange County jail has dealt with allegations of inmate abuse for more than three decades and “since 2000, four separate FBI investigations have been opened into reports that jail deputies used excessive force.”¹¹⁶ While Orange County inmates have won a few settlements, this has done nothing to stop the abusive treatment within the jail by deputy sheriffs.¹¹⁷ One such settlement was awarded to Robert N. Carter who, after questioning a nurse about his medication, was hit in the face and jaw by two deputies and later beaten by other deputies, causing multiple injuries, including a fractured jaw, cracked teeth, and a blood clot.¹¹⁸ The jury awarded Carter damages, but the deputies responsible for the beatings were not held accountable; instead Orange County and Sheriff Michael S. Carona were blamed for “failing to adequately supervise and train the deputies at the jail.”¹¹⁹ Another settlement was awarded to the family of deceased Orange County jail inmate Gilbert Garcia who died days after an altercation with jail deputies.¹²⁰ Even though a “coroner’s report indicated that Garcia died of internal bleeding caused by a skull fracture” and a blurry surveillance tape appears to show that Garcia was ill-treated, the Sheriff’s Department was once again cleared of wrongdoing, this time by the district attorney.¹²¹ The Sheriff’s deputies who wrongfully inflict pain on inmates should be found criminally liable.¹²²

114. *Id.* at 1247.

115. See McDonald, *supra* note 75.

116. John McDonald & Aldrin Brown, *Inmates Can Unite in Lawsuit*, ORANGE COUNTY REGISTER, Oct. 18, 2003, at 1-2.

117. See McDonald, *supra* note 75.

118. Mai Tran, *Carona, O.C. Lose in Jail Abuse Lawsuit*, L.A. TIMES, Mar. 28, 2003, at B1.

119. *Id.*

120. *FBI Probe of Jail Welcome*, L.A. TIMES, June 23, 2002, at B16.

121. *Id.*

122. The California Penal code states:

It shall be unlawful to use in the reformatories, institutions, jails, state hospitals or any other state, county, or city institution any cruel, corporal or unusual punishment or to inflict any treatment or allow any lack of care whatever which would injure or impair the health of the prisoner, inmate, or person confined . . . [a]ny person who violates the provisions of this section . . . shall be guilty of a misdemeanor.

CAL. PENAL CODE § 673 (West 2003).

An Orange County civil rights attorney, Richard P. Herman, is on a mission to reform the jail and eliminate inmate abuse by filing a class action lawsuit with more than 60,000 current and former inmates.¹²³ Herman states that deputies in the Orange County jail have never been thoroughly prosecuted for use of excessive force against inmates.¹²⁴ This begs the question: why does society not hold corrections officers accountable for their wrongs? Maybe the view of frivolous lawsuits portrayed by the legislators in favor of the PLRA and the “tough on crime” political platform has clouded the eyes of society while real injustices are harmfully inflicted on prisoners. Or possibly, people just do not care what happens to those in jail or prison, until one of their loved ones becomes the victim of unnecessary physical abuse.

The previous cases are examples that fortunately came to the attention of the court, despite the fact that, as Herman puts it, “jail authorities do not want to be given orders to do anything at all by anyone on the outside, and that includes federal judges.”¹²⁵ The need to rid its Department of Corrections of corruption and to abolish the code of silence among corrections officers is presently coming to the attention of the California legislature. In a recent investigation of the California Department of Corrections, Special Master John Hagar reported that top officials “under pressure from the powerful prison guards union, have been unwilling to discipline officers involved in attacks on inmates.”¹²⁶ Hagar was assigned to assist Judge Henderson in supervising court-ordered changes of the entire prison system based on the incidents at Pelican Bay.¹²⁷ The report takes note of how the prison guards’ union has strong influence over the Department of Corrections management and the ability to “derail internal affairs investigations.”¹²⁸ The California Correctional Peace Officers Association entered into a labor contract with the state of California and former Governor Gray Davis that “allowed them to interfere in disciplinary

123. McDonald & Brown, *supra* note 116.

124. Telephone Interview with Richard P. Herman, Civil Rights Attorney (Oct. 13, 2003).

125. McDonald & Brown, *supra* note 116.

126. Jeffrey L. Rabin & Dan Morain, *Officials Feel Heat Over Prison Report*, L.A. TIMES, Jan. 17, 2004, at B6.

127. Dan Morain, *Guards Union Faces Challenges to Status Quo*, L.A. TIMES, Jan. 18, 2004, at B1.

128. The prison guards union, or the California Correctional Peace Officers Assn. (CCPOA), “[r]epresent[s] 31,000 current and retired prison officers [in California], . . . has proved itself to be among the most potent interest groups in state politics.” *Id.* The CCPOA “donates millions of dollars to state politicians.” Tim Reiterman, *Prison Monitor Critical of Guards*, L.A. TIMES, June 25, 2004, at B1.

investigations.”¹²⁹ For example, one provision of the contract required the “prison administration to immediately provide guards with inmate grievances against them,” thereby “discourag[ing] inmates from making complaints.”¹³⁰ Judge Thelton informed the current Schwarzenegger Administration that if it does not take efforts to reform the prison system, he might place the State Department of Corrections under federal receivership.¹³¹ The state of California is on the verge of reforming its prison system, placing special attention on changing the “use-of-force policy” and establishing credible investigation procedures, which will hopefully encourage other states to follow California’s lead.¹³²

The code of silence is real, and maltreatment of inmates in all of our nation’s prisons and jails must be fairly handled. The administrative system within the correctional institution should not be given broad authority because of the potential for discretionary abuse. This is not to say that all prisons and jails operate under a code of silence or would fail to properly address inmate grievances. The fact that this problem regularly occurs, however, shows the unreliability of allowing claims of excessive force to be handled administratively. Rightfully, inmates must serve time for their wrongs, but certainly nothing can justify such cruel treatment as the cases mentioned above. A grievance system needs to be developed in which complaints of excessive force are fairly addressed and guards are held accountable.

IV. THE PROBLEM NOW

“Judges are not wardens, but we must act as wardens to the limited extent that unconstitutional prison conditions force us to intervene when those responsible for the conditions have failed to act.”¹³³ State prisons and jails do not have a uniform method of handling inmate grievances, and the result is ambiguity, disorganization, and unfairness. Standards need to be developed that make the grievance process fair,

129. Jenifer Warren, *Takeover of State Prisons is Threatened*, L.A. TIMES, July 21, 2004, at A1.

130. Hagar also requested Judge Thelton to “consider criminal contempt charges against former state [of California] Corrections Director Edward Almeida” for interfering with a perjury investigation of several corrections officers after the prison union got involved. Reiterman, *supra* note 128.

131. Warren, *supra* note 129.

132. *Corrections Report Finds a Flawed System*, *supra* note 31.

133. *Harris v. Fleming*, 839 F.2d 1232, 1235 (7th Cir. 1988).

efficient, and most importantly, focused on actually remedying the prisoners' issues.

A. A Model Grievance Process

The effect of *Porter* is that an inmate seeking redress for excessive force must exhaust all administrative remedies within the correctional institution before bringing the claim to court; otherwise the inmate's complaint will be dismissed.¹³⁴ The Federal Bureau of Prisons created the Administrative Remedy Program to "allow an inmate to seek formal review of an issue relating to any aspect of his/her confinement."¹³⁵ The Administrative Remedy Program applies to all inmates housed in federal institutions controlled by the Bureau of Prisons.¹³⁶ Although the program "does not apply to inmates confined in other non-federal facilities,"¹³⁷ because of the detail and organization of the program, it will be used as a model to be compared against various aspects of grievance procedures in state prisons.¹³⁸ The Administrative Remedy Program is set up to fairly address inmate grievances. Non-federal prison and jail grievance programs drastically stray from this model process and from one another. Furthermore, many grievance procedures serve no remedy for inmates complaining of excessive force because the rules are abused or simply disregarded by corrections officers.

The purpose of the Administrative Remedy Program is to make available a procedure for inmates "to have any issue relating to their incarceration formally reviewed by high-level Bureau officials."¹³⁹ The program states that each request and appeal will be answered,¹⁴⁰ and a record will be maintained.¹⁴¹ The grievance submission process is detailed and gives inmates adequate time to file complaints. Inmates must submit a formal written Administrative Remedy Request on the appropriate form within twenty days following the date of the incident for which the inmate is seeking remedy.¹⁴² However, an in-

134. See generally *Porter v. Nussle*, 534 U.S. 516 (2002).

135. 28 C.F.R. § 542.10(a) (2004); ADMINISTRATIVE REMEDY PROGRAM, *supra* note 12, § 1(a).

136. § 542.10(b); ADMINISTRATIVE REMEDY PROGRAM, *supra* note 12, § 1(b).

137. § 542.10(b); ADMINISTRATIVE REMEDY PROGRAM, *supra* note 12, § 1(b).

138. See generally ADMINISTRATIVE REMEDY PROGRAM, *supra* note 12.

139. ADMINISTRATIVE REMEDY PROGRAM, *supra* note 12, § 2(a).

140. *Id.* § 2(b).

141. *Id.* § 2(c).

142. § 542.14(a); ADMINISTRATIVE REMEDY PROGRAM, *supra* note 12, § 8(a).

mate who validly demonstrates a situation that prevented the inmate from submitting the remedy request or appeal on time may receive an extension.¹⁴³

Most importantly, the Administrative Remedy Program takes into consideration sensitive inmate grievances¹⁴⁴ and allows for these complaints to be submitted outside the particular facility and directly to the Regional Director.¹⁴⁵ Once received, these grievances are logged into the prison index with "vagueness as to subject code" in order to "accommodate the inmate's concerns."¹⁴⁶ This helps guard against retaliation from both other inmates and corrections officers named in the complaint.¹⁴⁷ In addition, allegations involving staff "may not be investigated by either staff alleged to be involved or by staff under their supervision."¹⁴⁸ Furthermore, physical abuse claims are directed to the Office of Internal Affairs, which is outside the prison facility.¹⁴⁹ Allowing excessive force grievances to be handled by an outside facility increases the chance that an inmate's complaint will be appropriately handled.

After a grievance is submitted, an inmate will be notified if the submission is rejected.¹⁵⁰ The inmate may then appeal the decision within a reasonable time limit.¹⁵¹ Once an inmate submits a grievance and it is filed, a response will be made within twenty to forty days depending on whether the complaint is sent to the Warden, the Regional Director, or the General Counsel.¹⁵² The major purpose of the Administrative Remedy Program is to "solve problems and be responsive to

143. One such valid reason for delay is if the inmate was "physically incapable of preparing a Request or Appeal." § 542.14(b); ADMINISTRATIVE REMEDY PROGRAM, *supra* note 12, § 8(b).

144. E.g., when an inmate's safety would be placed in danger "if the Request became known at the institution." § 542.14(d)(1); ADMINISTRATIVE REMEDY PROGRAM, *supra* note 12, § 8(d)(1).

145. § 542.14(d)(1); ADMINISTRATIVE REMEDY PROGRAM, *supra* note 12, § 8(d)(1).

146. ADMINISTRATIVE REMEDY PROGRAM, *supra* note 12, § 13(a).

147. *See id.*

148. *Id.* § 13(b).

149. *See id.*

150. *See id.* § 11. If a submission is rejected, the inmate must be "provided [with] a written notice, signed by the Administrative Remedy Coordinator, explaining the reason for rejection." § 542.17(b). If the rejection is based on a defect that is correctable, "the notice shall inform the inmate of a reasonable time extension . . . to correct the defect and resubmit the [r]equest or [a]ppeal." *Id.*

151. Such time limit is twenty to thirty days. Once again, if the inmate does not submit his appeal on time, and he "demonstrates a valid reason for delay, the[] time limit[] may be extended." § 542.15(a); ADMINISTRATIVE REMEDY PROGRAM, *supra* note 12, § 9(a).

152. *See* § 542.18; ADMINISTRATIVE REMEDY PROGRAM, *supra* note 12, § 12.

issues inmates raise.”¹⁵³ In doing this, the program takes a fair and reactive approach to all inmate grievances, giving special consideration to claims of excessive force and handling them outside of the particular facility.¹⁵⁴ It is also important to note that throughout the process the inmate is given notice as to the status of his grievance.¹⁵⁵ This is especially important for complaints that are denied, because if the inmate does not get notice and he is unable to appeal the decision, he can never exhaust his administrative remedies.

The remedy program of the Federal Bureau of Prisons is set up to efficiently handle inmate grievances. Moreover, the procedures are uniformly applied across the United States to each institution operated by the Bureau of Prisons.¹⁵⁶ Therefore, inmates in a federal prison in any state receive equal treatment and remedy for their grievances. This type of standardization should be adopted by state corrections systems because the grievance procedures in state prisons and jails vary widely, and more importantly, they do not provide the same level of investigation and procedural fairness to inmates’ claims.

B. Problems with Grievance Procedures in State Jails and Prisons

Post-*Porter*, federal courts are faced with a new genre of inmate litigation, cases that show how administrative procedures fail prisoners because they are either denied access to the grievance system by prison guards or are affected by the limitations in the various remedy programs. Grievance programs vary widely depending on the institution. For instance, the time limits for an inmate to administratively file a complaint differ across the board. Federal prisons give an inmate twenty days following the date of the incident for which the inmate is seeking remedy to submit a remedy request,¹⁵⁷ whereas time limitations in state prisons tend to be much shorter and vary from state to state.¹⁵⁸

Problems arise from short deadlines when inmates are directly taken to segregation units, like the SHU, after an assault by prison

153. ADMINISTRATIVE REMEDY PROGRAM, *supra* note 12, § 11(b)(3).

154. *See id.* § 13(b).

155. *See* § 542.17(b); ADMINISTRATIVE REMEDY PROGRAM, *supra* note 12, § 11(b).

156. § 542.10(b); AMINISTRATIVE REMEDY PROGRAM, *supra* note 12, § 11(b).

157. § 542.10(a); AMINISTRATIVE REMEDY PROGRAM, *supra* note 12, § 8(a).

158. For example, Tennessee prisons give inmates seven days, Kentucky allows five days, and Metro Dade in Florida and Rhode Island require an inmate to file a complaint three days after the incident. Brief of Amici Curiae American Civil Liberties Union et al. at 28, n.11, *Booth v. Churner*, 532 U.S. 731 (2001) (No. 99-1964).

staff.¹⁵⁹ Placement in a separate area delays access to grievance procedures and the necessary forms so that an inmate becomes time-barred from exhausting administrative remedies.¹⁶⁰ In *Arnold v. Goetz*,¹⁶¹ David Arnold was taken directly to the SHU after he was assaulted by corrections officers.¹⁶² Fortunately, the federal district court in New York held that because the guards did not show that Arnold had access to the prison library in order to obtain grievance forms, the inmate's action was not dismissed due to failure to exhaust administrative remedies.¹⁶³

In other circumstances, inmates requesting grievance forms are flatly denied by corrections officers. An inmate who was beaten by corrections officers at the Nassau County Correctional Facility in New York sent a handwritten letter to the facility's Grievance Coordinator describing the incident and asking for a grievance form, but the form was never provided.¹⁶⁴ In the Orange County jail in California, inmates fortunate enough to obtain a grievance form (known to guards as a "snivel sheet") are automatically rejected when they attempt to turn over the complaint.¹⁶⁵ The deputy sheriffs repeatedly tell inmates, without actually reviewing the grievance form, that it is filled out incorrectly and is invalid.¹⁶⁶ In Minnesota, prisoners are deterred from filing complaints because they are required to "submit a written grievance to the staff who is directly responsible for the issue being grieved."¹⁶⁷ If inmates cannot receive access to the grievance system, how can they be expected to exhaust all available administrative remedies? Courts should not condone a corrections system that "keep[s] inmates in ignorance of the grievance procedure and then fault[s] them for not using it. A grievance procedure which is not made known to inmates is not an 'available' administrative remedy."¹⁶⁸

Even when an inmate correctly files an initial grievance, the complaint will be dismissed in court for failure to exhaust administrative

159. *Id.* at 30.

160. *Id.*

161. 245 F. Supp. 2d 527 (S.D.N.Y. 2003).

162. *Id.* at 539.

163. *Id.*

164. See *Abney v. County of Nassau*, 237 F. Supp. 2d 278, 279 (E.D.N.Y. 2002).

165. Telephone Interview with Richard P. Herman, *supra* note 124.

166. *Id.*

167. Brief of Amici Curiae American Civil Liberties Union et al., *supra* note 158, at 34 (citing Minnesota Department of Corrections Division Directive No. 303.100 at 2, Mar. 1, 2000).

168. *Hall v. Sheahan*, No. 2000 C 1649, 2001 WL 111019, at *2 (N.D. Ill. 2001).

remedies if the inmate did not properly appeal a rejected grievance. State prisoners, however, are rarely given notice that a grievance was denied. In *Mendoza v. Goord*,¹⁶⁹ inmate Mendoza filed an excessive force grievance within the prison system on May 3, 1999.¹⁷⁰ After not hearing back from the prison, Mendoza submitted another grievance in August stating that he never received a ruling on the initial grievance.¹⁷¹ Prison files documented that the grievance was denied on May 25. Therefore, the court found that Mendoza failed to exhaust all administrative remedies and dismissed the action.¹⁷² The inmate was expected to appeal to the next level even though he was never notified that an appeal was necessary. The court was indifferent to the lack of due process accorded the inmate, stating that an inmate is not prevented from appealing, “as a result of negligent error by prison officials—or even their *deliberate attempt to sabotage a prisoner’s grievance*.”¹⁷³ In *Taylor v. Bermudez*,¹⁷⁴ the United States District Court for the Southern District of New York arrived at a similar holding.¹⁷⁵ Inmate Taylor also filed an excessive force grievance, was never notified of its status, and sent letters to the defendant guards requesting information about his complaint.¹⁷⁶ Eventually Taylor was informed that “no record existed of the initial grievance,”¹⁷⁷ and he was denied the opportunity to re-file the complaint because of the amount of time that had passed.¹⁷⁸ The district court again found that when a prisoner fails to receive a response, he must still appeal his grievance and that the letters written to prison officials requesting information on the status of the grievance did not establish exhaustion of remedies.¹⁷⁹

These prison procedures differ substantially from the Administrative Remedy Program, which requires that if a submission is rejected, the inmate must be provided with written notice.¹⁸⁰ A system that does not provide an inmate notice on the outcome of his complaint

169. *Mendoza v. Goord*, No. 00 Civ. 0146(GEL), 2002 WL 31654855 (S.D.N.Y. Nov. 21, 2002).

170. *Id.* at *1.

171. *See id.* at *1 n.1.

172. *Id.* at *3.

173. *Id.* at *2 (emphasis added).

174. *Taylor v. Bermudez*, No. 03 Civ. 0087(NRB), 2003 WL 21664673 (S.D.N.Y. 2003).

175. *Id.* at *4 (dismissing the action for failure to exhaust administrative remedies required under the PLRA).

176. *Id.* at *3.

177. *Id.*

178. *Id.*

179. *Id.* at *3-4.

180. §542.17(b); ADMINISTRATIVE REMEDY PROGRAM, *supra* note 12, § 11(b).

and then dismisses his claim for failure to exhaust administrative remedies is not just. Fortunately, some courts do find this appeals process improper. In *Abney v. County of Nassau*,¹⁸¹ the court stated that “[i]n the absence of a procedure allowing continuation of the appeal process . . . [an] inmate cannot be faulted for failing to pursue an unanswered grievance. Nor can he be said to have failed to exhaust his administrative remedies.”¹⁸²

States should strive to formulate administrative procedures similar to those in the Administrative Remedy Program, not only to endorse a fair remedy process, but because it may reduce inmate litigation. In comparing complaints filed in federal district courts by state inmates versus federal inmates, state inmates filed eighty percent.¹⁸³ If the state departments of corrections do not take steps to reform their systems, an independent agency must be created to ensure inmates’ claims are heard and answered, and guards are held accountable for any wrongdoing.

V. CONCLUSION

The progress of mankind from physical force to the substitution of moral power in the art and science of government in general, is but very slow, but in none of its branches has this progress, which alone affords the standard by which we can judge of the civil development of a society, been more retarded than in the organization and discipline of prisons. . . .¹⁸⁴

The events at Abu Ghraib prison were highly publicized and those involved are currently being prosecuted by the military. The public needs to recognize that Abu Ghraib was not an isolated event. The forms of abuse that were revealed there occur in American prisons constantly. The power structure and isolation of prisons perpetuate abusive practices. When the Supreme Court held in *Porter v. Nussle* that claims of excessive force must be exhausted administratively within the prison system before seeking redress in federal court,¹⁸⁵ it took away the ability for an outside party to check on corrections op-

181. 237 F. Supp. 2d 278, 283 (E.D.N.Y. 2002).

182. *Id.*

183. BOJ STATISTICS, *supra* note 17, at 1-2.

184. Francis Lieber, translator’s introduction to Alexis de Tocqueville and Gustave de Beaumont, *On the Penitentiary System in the United States and Its Application to France*, 1833. TED CONOVER, *NEW JACK: GUARDING SING SING* 171 (Vintage Books ed., 2001) (2000).

185. *Porter v. Nussle*, 534 U.S. 516, 519 (2002).

erations. Others writing about this problem have suggested making the exhaustion requirement discretionary by developing guidelines for judges regarding when to apply the requirement.¹⁸⁶ I suggest that unless individual states choose to expend resources to revamp the prison system and the investigatory process to something similar to the Administrative Remedy Program, outside agencies must be created to investigate inmate complaints and find ways to hold prison guards accountable.

Discretion to handle claims of excessive force should not be put in the hands of correctional institutions. The impartiality of an outside agency is needed to collect and investigate inmate grievances. What is suggested is something only a handful of states currently utilize, a prison ombudsman agency.¹⁸⁷ Many states already have general ombudsman agencies.¹⁸⁸ The United States Ombudsman Association (USOA) defines a general government ombudsman as "an independent, impartial public official with authority and responsibility to receive, investigate, or informally address complaints about government actions."¹⁸⁹ Essentially, an ombudsman investigates complaints regarding a government agency so that court involvement is not necessary. One important aspect of an ombudsman agency, and what provides credibility, is its independence from the government agency it is investigating.

A prison ombudsman would operate the same way as a government ombudsman, but would solely handle complaints from inmates and their family members. Ideally, an inmate would submit a complaint to the particular state prison ombudsman agency, and a prison ombudsman would be assigned to investigate the grievance and then work with the inmate and the prison to resolve the problem. Because an ombudsman is impartial, and not considered to be representing the inmate, he or she is able to fairly assess the complaint and take action. Standards that require prison administrators to provide an ombudsman with access to all files and personnel in order for the ombudsman to

186. See Cindy Chen, Note, *The Prison Litigation Reform Act of 1995: Doing Away With More Than Just Crunchy Peanut Butter*, 78 ST. JOHN'S L. REV. 203, 229-30 (2004).

187. See, e.g., CAL. PENAL CODE § 5066 (West 2004); IND. CODE § 4-13-1.2-1 (West 2004); KAN. STAT. § 74-7403 (West 2004); OR. REV. STAT. § 423.400 (West 2004).

188. See generally UNITED STATES OMBUDSMAN ASSOCIATION, at <http://www.usombudsman.org> (last visited Nov. 6, 2004).

189. The USOA divides its standards into four categories: independence, impartiality, confidentiality, and a credible review process. UNITED STATES OMBUDSMAN ASSOCIATION, GOVERNMENTAL OMBUDSMAN STANDARDS (Oct. 2003), <http://www.usombudsman.org/References/standards.htm>.

competently do his or her job are extremely important.¹⁹⁰ In cases where an inmate was physically mistreated by a guard, a prison ombudsman needs to be given the authority to follow up on the case and make sure the guard is disciplined. The prison ombudsman should have a direct relationship with the District Attorney's or Attorney General's office so problem cases can be recommended for prosecution. Establishing an effective prison ombudsman agency achieves the purpose behind the PLRA because solving an inmate's complaint without filing an action in federal court will reduce inmate litigation.

Currently there are two main models that a state can use when adopting a general ombudsman agency: the standards of the USOA or those of the American Bar Association (ABA).¹⁹¹ States can also develop their own models through legislatures and by statute.¹⁹² The prison ombudsman office for the California Department of Corrections (CDC) was created by statute and approved by the Governor's office.¹⁹³ The California corrections ombudsman agency, however, is not completely independent from the Department of Corrections; it works for and reports to the Director of the CDC.¹⁹⁴ This lack of independence creates the same potential for corruption that currently plagues the CDC. Although the current lead corrections ombudsman, Ken Hurdle, is personally dedicated to stopping the code of silence in California's prisons, the office is not well-funded.¹⁹⁵ California has thirty-two prison facilities, but there are currently only six out of seven prison ombudsman positions filled, and major investigations are referred to a separate state agency, the Office of the Inspector General.¹⁹⁶

Unfortunately, the prison ombudsman concept is not widely known and has not been met with enthusiasm for its importance. For instance, although Arizona established the office of the Ombudsman-Citizens Aide, the creating statute specifically rejects the investigation

190. This should also include access to the inmate who initially filed the complaint with the agency.

191. Hawaii, for example, uses the USOA model for its ombudsman agencies. See UNITED STATES OMBUDSMAN ASSOCIATION, *supra* note 188. The ABA also formulated standards for the creation of a general ombudsman agency. See AMERICAN BAR ASSOCIATION, <http://www.abanet.org/adminlaw/ombuds/home.html> (last visited Sept. 1, 2004).

192. See, e.g., CAL. PENAL CODE § 5066 (West 2004); OR. REV. STAT. § 423.400 (West 2004).

193. Telephone Interview with Ken Hurdle, California Department of Corrections Lead Ombudsman (June 10, 2004).

194. *Id.*

195. *Id.*

196. *Id.*

of "complaints filed by a person in the custody of the state department of corrections."¹⁹⁷ Other prison ombudsman agencies have been closed for state budgetary reasons.¹⁹⁸ The prison ombudsman concept needs to be expanded and funds must be provided to keep it going strong. State governments need to realize that a prison ombudsman program that is independent from a potentially corrupt prison administration will help inmates have their complaints answered by an impartial outside agency, will reduce court costs and inmate litigation, and, if set up correctly, will make prison guards responsible for maltreatment of inmates.

Regardless, some action must be taken to ensure the forms of abuse mentioned in this article are deterred and those responsible are held accountable. It is doubtful that positive change will occur if state prisons and jails are allowed to maintain their ineffective and uninvestigated administrative grievance procedures. Much of society does not think twice about the plight of the inmate. However, people do not frequently hear about the maltreatment of prisoners unless someone close to them experiences it. Inmates are not considered a favorable portion of the American population, but they are individuals who should not be forgotten or disregarded just because they are behind prison walls where their voices are not readily heard. One must remember that an inmate is a son, daughter, brother, father, husband, and most importantly, a human being.

*Andrea Jacobs**

197. ARIZ. REV. STAT. § 41-1377(D) (West 2004).

198. The Michigan corrections ombudsman program is an example. *See America's Prisons*, DETROIT FREE PRESS, May 23, 2004, http://www.freep.com/voices/editorials/epris23_20040523.htm (last visited Sept. 1, 2004).

* University of Washington, B.A., cum laude, 2001; J.D. expected December 2004, California Western School of Law. I would like to thank my Mom and Dad for being amazing parents and always giving their love and support. Dean, your strength motivated me to write this article. Thank you to the *California Western Law Review*. My hope is that the public realizes that inmate abuse is a reality, that punishing prisoners in this way is wrong and dehumanizing, and that somehow change happens.

